83-1969

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

NO. _____

~~ALVIS VANDYGRIFF~~, FIRST SAVINGS AND LOAN ASSOCIATION OF BOWIE, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LULING, EXCHANGE SAVINGS AND LOAN ASSOCIATION, AND MAINLAND SAVINGS AND LOAN ASSOCIATION,
Petitioners-Defendants

v.

EDWARD N. PHILLIPS,
Respondent-Plaintiff

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT BY FIRST SAVINGS AND LOAN ASSOCIATION OF BOWIE, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LULING, EXCHANGE SAVINGS AND LOAN ASSOCIATION, AND MAINLAND SAVINGS AND LOAN ASSOCIATION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Circuit's holding that Associations could be penalized in damages for requesting information from the Texas Savings and Loan Department on a prospective top managing officer of a fiduciary institution, would have an impermissible chilling effect on First Amendment freedoms acknowledged by the Circuit.

2. Whether the Circuit erred in holding that Associations could have conspired as "willful participants" who intended to deny Plaintiff a hearing on Department's information in joint activity with Department where the evidence shows Associations did not request or agree that Department deny Plaintiff a hearing, and had no control or knowledge as to whether Department denied Plaintiff a hearing.

3. Whether the Circuit erred in selecting the wrong remedy against the wrong defendants for the alleged civil rights violations -- subjecting Associations to

actual and punitive damages for their praiseworthy conduct in requesting information from Department on prospective top fiduciary managers, rather than simply according Plaintiff his remedies as to Department either by injunctive or declaratory relief or by administrative hearing.

4. Whether the Circuit erred in holding that Associations could have denied Plaintiff a protected liberty or property interest in becoming the top managing officer of a savings and loan association by requesting and listening to Department's truthful information where Plaintiff had never before served as top managing officer in the savings and loan industry and had not worked in the industry for two years.

PARTIES TO THE PROCEEDING BELOW

Parties included those listed in the style, Texas Savings and Loan Department, and Paris and North Texas Savings and Loan Associations. Exchange, later known as Royal Savings, has since merged with Home Savings. Bowie later merged with Continental Savings.

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STATEMENT OF GROUNDS FOR JURISDICTION

The Fifth Circuit's Judgment on Rehearing of February 6, 1984, overruled Defendants' petitions for rehearing. 28 U.S.C. §1254(1) confers certiorari jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment to the Constitution of the United States, 42 U.S.C. §1983, and relevant provisions of the Texas Administrative Procedure and Texas Register Act are included at App. G-1, G-2.

STATEMENT OF THE CASE

Plaintiff's complaint was filed January, 1980, against Commissioner Vandygriff, former Deputy Commissioner Wright, Texas Savings and Loan Department, and seven savings and loan associations, raising claims of antitrust, refusal to deal, group boycott, libel, and tortious interference. Plaintiff alleged Defendants conspired to exclude him from employment in the savings and loan industry through a custom of screening prospective candidates for managing officer through Commissioner. R.1, 171. Plaintiff amended to add a generalized civil rights claim March 23, 1981, making no specific mention of de facto licensing without due process.

Phillips was one of two vice-presidents at First Federal Savings of Marshal, which he left in 1975 while earning an annual salary of $15,000. Tr. 44, 153; Ph. (Phillips Dep.) 17. After leaving, he was employed at Lawyer's Title in Longview from March to June, 1975. Tr. 803-4, 814-5. He caused the title company

to issue him a title policy that did not show an outstanding note based upon his representation that he would take care of the note and the title company would not get hurt. The transaction cost the owner of the title company $19,999. Tr. 806-7, 819.

Phillips also tried to get into the banking business in an attempted purchase of the Milford State Bank. Phillips had no authority to act on behalf of the bank, but a letter of credit was issued from Milford State Bank to Longview National Bank which he signed as chairman and chief executive officer although he was not connected with the bank and was neither chairman nor chief executive officer. Tr. 833-9; Dx. ZZ. The cashier's signature on the letter was forged. Tr. 853-4. In addition, Phillips found his venture into real estate to be financially unsuccessful. Tr. 48.

1. Bob Cartwright -- Sinton Savings

In early 1977, Phillips was introduced to Sinton Savings and Robert Cartwright through Jerry Simmons who headed up Sinton Service in

Dallas, an unauthorized subsidiary of Sinton Savings. Tr. 52, 675, 399-400; Ph. 190-4. Phillips went to Houston and Sinton to look over the situation and Cartwright offered him the presidency of Sinton Savings. After meeting with Cartwright, Phillips went to Sinton and was introduced to the board of directors August 18, 1977, two days after the State of Texas placed Sinton Savings under supervision and ordered Cartwright removed from office. As a result of Cartwright's self-dealings, the association had been under constant examination since December, 1976. Ph. 199-200; Tr. 56, 291-2, 300.

Cartwright had Phillips accompany him to a meeting with Vandygriff and Wright at the Department on August 30, 1977. Phillips was excused from the meeting. Ph. 204-6; Tr. 60-1; 171-2, 304-6; Dx. L. Neither Wright nor Vandygriff really knew Phillips at this time and were in no position to divulge any information they had obtained as a result of their examination of Sinton. Phillips was not

an officer, director, depositor or employee of the association. Tr. 61, 75, 308-9, 628-31, Ph. 147-8. At about the same time the State obtained an injunction and placed Sinton Service Corp. in receivership. Tr. 317, 680.

After the August 30, 1977 meeting, Phillips continued to associate with Cartwright. Phillips accompanied Cartwright to New York and introduced Cartwright to his associate, Rahuba. Tr. 61-68, 173; Ph. 210. Department had previously encountered Rahuba and Vandygriff was of the opinion that Rahuba's reputation was bad. Tr. 387-9. Upon returning from New York, Phillips obtained from Cartwright a Sinton car and credit card for his own use. Department's next contact with Phillips involved attempts to regain possession of the automobile and credit card. Ph. 195-8; Tr. 68-73, 173-4, 317-9, 645; Dx. T, U. Subsequently, Phillips again contacted Vandygriff who indicated he could not disclose the information he had concerning Cartwright, but suggested that Phillips disassociate

himself from Cartwright. Tr. 75-6, 322-3; Ph. 148. Rather than follow Vandygriff's suggestion, Phillips continued to associate with Cartwright. In November, 1977, Phillips obtained a personal loan from a Houston bank which was co-signed by Cartwright. Tr. 144-5, 175-6. Phillips was also involved in an attempt to purchase Irving Savings with Cartwright and his associates Griffin and McGlon at a meeting in early spring of 1978. Tr. 86-8, 179-81, 678, 692-8, 700, 857. As a result of involvement with Sinton, Simmons pled to a misdemeanor, and Cartwright was convicted of a felony. Tr. 681, 126.

2. Bowie Savings

Concerning Bowie Savings, Phillips admitted in his deposition, 178, that he was not aware of any conversations between Bowie and any other association in this lawsuit concerning Phillips. Phillips admitted that Bowie to his knowledge had not in any way interfered with any of Phillips' other applications for employment or any other contractual

relationships which Phillips tried to enter into; that to his knowledge there had been no effort on Bowie's part to maliciously spread any type of rumors about Phillips in his search for employment; and that Bowie had not conveyed any rumor, facts or statements about Phillips to any other prospective employer. 178-9. Phillips testified, 168, Bowie's attorney, Homer Caston, told him he had talked to some people in Austin who said Phillips had some problems over past dealings, and that Bowie would not pursue further talks with Phillips.

Phillips admitted that Bowie's representative Spaeth indicated Bowie already had a man in their home office acting as managing officer; that Bowie asked Phillips if he was interested in going to Bowie's branch in Gainesville; and that Phillips said he was not interested in going there. Phillips' real hope was that, if the Dodd-Boone group purchased Bowie, Phillips would get a job after the purchase. Even if there was no purchase,

Phillips wanted Bowie to keep him in mind if they hired a managing officer, but they never offered him a specific job. Ph. 171-2.

Bowie's President, Henry Spaeth, testified he first met Phillips when Phillips drove in his yard and wanted to talk about a management job for Bowie. The managing officer at that time was Joe Falsone, who had been managing officer about a year and a half. Spaeth told him that if Bowie could find someone better than what they had, they would consider it, but they were not unhappy with Falsone. Spaeth and Bowie's Chairman of the Board met again with Phillips that evening, and told him they would have to present the matter to the Executive Board, which was meeting the next day. At that meeting the Board decided they were going to keep Falsone as managing officer and try to sell the association. Spaeth never talked to anybody else about Phillips and didn't call anybody and didn't check any of his former jobs because they didn't get that far along. Sp. 9-10, 15-17.

Phillips called Spaeth that evening, and Spaeth told him the Board decided they were going to keep what they had. Phillips mentioned buying the association, and Spaeth told him Bowie was willing to sell if Phillips had the money and the people. Thereafter, Phillips made numerous telephone calls to Spaeth on hiring him as a manager or selling the association, and Spaeth told him to just come up with the money. Spaeth eventually sold the association to a Houston group in January, 1980. Spaeth never talked to any other association about Phillips; never talked to Department about Phillips; and did not remember discussing problems Phillips might have had with Commissioner's office. Sp. 17-20, 23, 29-30. Bowie's attorney Caston and Commissioner and Deputy Commissioner were likewise unable to recall such a conversation. Ca. 8-10, 15-6; Va. 80-1; Wr. 28-9.

3. First Federal of Luling

Phillips again contacted Vandygriff, who suggested that Phillips contact Margaret

Cashin concerning possible job leads through her employment agency. Tr. 322, 107. Phillips did contact Cashin and provided her with his resume which listed Rahuba as a reference. Tr. 191-5; Dx. LL. Through Cashin, Phillips obtained some job leads, including First Federal of Luling and Aztec. Tr. 108, 111, 196-7. Aztec was a newly chartered association needing Commissioner's approval to install a managing officer. Tr. 289, 328, 491.

Phillips applied at First Federal of Luling where no job offer was made. Tr. 109; Ph. 180-2. Although Vandygriff does not remember being contacted by First Federal's Zahnow, he does not dispute that Zahnow contacted him. Tr. 334-5. Vandygriff told Zahnow he would not recommend Phillips; that Phillips had fallen in with some bad company and had been associated with Cartwright. Tr. 404-5; Za. 15-7, 26, 34-7, 52-3, 60. Although Phillips contends he was the top candidate, Tr. 109-10, Zahnow states they found someone more quali-

fied, and that any comment from Vandygriff played very little part; it was Phillips' lack of accounting background that hurt him. Tr. 410, 424, 438-9; Ph. 184-5; Za. 42, 45-6, 22.

Immediately after Luling and Aztec, Phillips called Vandygriff and arranged a meeting in Austin on November 7, 1978. Tr. 114-5, 201, 325; Dx. S; Ph. 108-12. Phillips convinced Vandygriff that he had not received any money from Sinton or Cartwright and that he was completely disassociated from Cartwright. Tr. 119, 340-8. This was shortly after Cartwright's indictment. Tr. 325. Vandygriff's confidence in Phillips did not last long as Dodd, Phillips' former partner, came to Austin in November to present information that Phillips did receive a fee for arranging a commitment through Cartwright. This was also confirmed by Dodd's other partner, Boone. Tr. 349, 770-2; Dx. S.

4. Exchange, Mainland and Civic

Phillips first contacted Exchange in November, 1978, through Sy Bieler, then

president of Exchange. The conversation was terminated by Bieler without indicating any possible opening for Phillips. During 1979, Phillips renewed his efforts to secure employment with Exchange by calling the new president, Earl Hall, who had never heard of Phillips. Ph. 236; Ha. 11, 20, 34. Although Exchange was not looking for employees and had no openings, Hall allowed Phillips to come from Longview to visit in Dallas. Ha. 10; R. 595. Hall stated there were no openings available and only allowed Phillips to put in a verbal application out of courtesy and at the insistence of Phillips. Ha. 34; R. 608.

Hall did nothing further on Phillips' request for employment since he did not have a position open. However, Phillips continued to call Hall over a period of three months. Hall made no effort to follow up on Phillips' references in any manner. Ha.11-3, 36-7; R.596-7.

During a telephone conversation Phillips asked Hall if Exchange had found out anything about the problem Phillips had been having

with Commissioner, and asked Hall to check and see what problems Phillips might have in the industry. Ha. 12, 37; R. 597, 611. While on a visit to Austin to discuss regulatory matters concerning Exchange with Commissioner, Hall did inquire about Phillips and his relationship with Department. Hall testified he received no negative comments as to Phillips and so reported to Phillips. Ha. 15-8, 42-6; R. 600. Phillips contended Hall advised him he had problems with Department and that it might be best if he let some time pass so he could reestablish himself within the industry. Ph. 237-40; R. 625-8.

Phillips applied for a top management position with Mainland's president Raymond Hill. Since in the past Commissioner's office had given him unfavorable references, Phillips warned Hill about that. At this point, Hill had not agreed, either orally or in writing, to employ Phillips. R. 100; Ph. 101-4, 112-4.

According to Phillips, due to this warning, Hill contacted Commissioner's office and

received an unfavorable report about Phillips. Hill told him the unfavorable reference resulted from his involvement in the Sinton thing, and continued association with Cartwright, Bebe and Taylor. Hill told Phillips he would not hire anyone who received unfavorable recommendation from Commissioner's office. Ph. 116, 123. Hill denied these allegations, testifying that Phillips was not hired because he lacked knowledge and experience in the secondary bond market. Hi. 29-31.

Phillips has not had any subsequent contact with either Hill or Mainland. Phillips was not aware of any conversations regarding Phillips that occurred between Mainland and Associations. Ph. 123-4, 103; R. 100-1. Mainland denied speaking to any other Association about Phillips, and denied discussing Phillips' employment application with Commissioner's office. Hi. 21-24.

Phillips succeeded in obtaining employment in the savings and loan business when he was hired at an $18,000 per year job with Civic

Savings in October, 1979. He quit shortly thereafter and filed the instant lawsuit January, 1980. Tr. 136; R. 1.

5. Trial and Appeal

Prior to trial, Plaintiff and Defendants took a long list of depositions, including those of Plaintiff and his witnesses, Defendants' officers and directors, and numerous third-party witnesses. Associations filed motions for summary judgment based on the deposition evidence, claiming First Amendment protection, common law privilege, and numerous other grounds. The District Court granted the motions for summary judgment filed by Associations except as to First Federal, on which no formal order was signed, and Paris, which proceeded to trial with Commissioner, his deputy, and Department.

At trial, the District Court directed a verdict against Plaintiff's antitrust claims, and Plaintiff's attorney agreed an antitrust claim had not been proved. Tr. 900-1. The jury found for Paris and the former Deputy Commissioner.

The jury found that Commissioner's statements to Associations were true; but that Commissioner was not acting in good faith. The jury was charged that state defendants were entitled to a defense of good faith if acts complained of "were performed in the course of official duty"; but was not advised that Associations were under a duty to investigate the qualifications of top managing officers; or that Commissioner had a duty to furnish information in that regard. R. 862, 858.

After motions for judgment, the District Court entered judgment for Defendants November 4, 1981, based on sovereign immunity and the jury finding that Commissioner's statements to Associations were true. Plaintiff appealed to the Fifth Circuit. The Circuit in two opinions affirmed the judgment against Plaintiff's antitrust claims, but remanded Plaintiff's §1983 civil rights claim and his tortious interference claim.

REASONS FOR GRANTING THE WRIT

1. The Circuit's holding that

Associations could be penalized in damages for requesting information from the Texas Savings and Loan Department on a prospective top managing officer of a fiduciary institution would have an impermissible chilling effect on First Amendment freedoms acknowledged by the Fifth Circuit.

Communications as Protected Speech

The Circuit's first opinion recognized an industry custom for savings and loan associations to contact the Texas Savings and Loan Department when evaluating a candidate as top managing officer; but navigated just short of declaring those communications protected by the First Amendment, as follows:

> "The savings and loan industry is clearly one in which the public places great trust and confidence. It is imperative that the managerial officers of savings and loan associations be of the highest character, and an association that hired a managing officer without investigating his or her character would certainly be remiss. The

> Commissioner of the Texas Savings and Loan Department is obviously a valuable resource for an association inquiring about a prospective employee, and, indeed, we applaud that aspect of the practice." (emphasis added), 711 F.2d 1219, 1226.

The Circuit later discussed Commissioner's unique position to serve as a clearinghouse of information for savings and loan associations deciding whether to hire a prospect as top managing officer, as follows:

> "The practice here of consulting with Vandygriff has substantial joint efficiency-creating economic potential. As mentioned before, the savings and loan industry is a repository of public trust and confidence. It is vital to the industry that the managing officers of the associations be of highest character and ability. It would be difficult, if not impossible, for every savings and loan association to assume the responsibility of thoroughly investigating the background of each and every potential managing officer. The Commissioner of the Texas Savings and Loan Department is in a unique position to serve as a clearinghouse for information on people working in the industry. Consulting with him with regard to prospective employees is an eminently reasonable technique for reducing the information-collecting costs of the individual savings and loan associations.

> Of course, this relates only to the use of Vandygriff as an information resource. The custom of which Phillips complains is that of giving Vandygriff de facto licensing power. Still, we believe that the de facto licensing power is 'at least potentially reasonably ancillary' to the practice of using Vandygriff as an information resource. Thus, we conclude that the practice of screening prospective managerial employees with the Commissioner is 'at least potentially reasonably ancillary to joint efficiency-creating economic activities.' Id." (emphasis added), 1229.

However, the Circuit's first opinion did not squarely affirm that Associations' right to make such communications with Department achieves a constitutional magnitude.

On petitions for rehearing vigorously arguing the chilling effect on First Amendment freedoms, the Circuit's second opinion expressly recognized that Associations' communications with Commissioner were protected by the First Amendment, and disclaimed any intent to chill First Amendment freedoms:

> "We have noted in our original opinion that we did not wish to chill any practice by which savings and

> loan associations consult with the savings and loan commissioner about the qualifications and reputation of applicants for managerial positions. No one suggests that such a practice does other than ensure the integrity of persons holding positions of trust and responsibility, and thereby serve an important public interest. Such communications also have the benefit of First Amendment protection." (emphasis added), 724 F.2d 492-3.

Concerning the basis of such protection, any ordinary corporate employer for any non-fiduciary institution would have had a common law right or duty to investigate the background and qualifications of a person being considered for possible employment and to check with any relevant law enforcement or regulatory agencies. Estate of Arrington v. Fields, 578 S.W.2d 173, 177-8 (Tex. App. 1979, writ ref'd n.r.e.). A fortiori, any defendant savings and loan association when evaluating a candidate for possible employment as a top managing officer having the highest fiduciary duties in a fiduciary institution, would clearly have had a privilege, right or duty to contact the Savings and Loan Department of the

State of Texas; to inquire concerning his qualifications; and to act in accordance with any information received. McDowell v. Texas, 465 F.2d 1342, 1344 (5th Cir. 1971), cert. denied, 410 U.S. 943 (applying Texas common law privilege for communication between persons sharing common interests).

An association and its directors would have had the positive right and the affirmative legal duty to protect its shareholders, its depositors and the public by taking appropriate investigative action when making such a decision. Because any Defendant Association would have had a right, privilege or duty to contact any appropriate law enforcement or regulatory authorities and ask for information on Phillips' background and qualifications, it necessarily would have had the right to listen to any answers or information received and act accordingly.

Here, each Association testified it decided not to hire Phillips for a different reason. Bowie decided to keep its managing officer and

sell the association; First Federal needed a managing officer with a strong accounting background, which Plaintiff lacked; Mainland needed a managing officer with secondary bond market experience, which he lacked; Exchange had no position open. However, even if it is assumed arguendo for summary judgment purposes that each Association decided not to hire Plaintiff because of adverse information from Department, Defendants had a constitutional right under the First Amendment to communicate with Department concerning qualifications of a prospective top managing officer and should not be punished in damages for doing so.

Plaintiff himself admitted in his deposition that he was sure an association had a legitimate interest in getting a person of high moral character and personal integrity and honesty for an operating officer; that he as operating officer would have had the same interest; that Commissioner would have had such concern; and that it was perfectly understandable that an executive officer in a

regulated industry would follow Commissioner's recommendation if the Commissioner opposed hiring a particular person for a management office. Phillips further testified that when any savings and loan people asked whether he minded their contacting Department, he told them he didn't mind. Ph. 260-2, 234.

This right of an Association to contact its regulating authority for information on a possible candidate for top managing officer is not merely a common law right; it is a right of constitutionally protected stature under the First Amendment. Any statements that were in fact made or actions taken in regard to Plaintiff by state-regulated associations were statements and actions by public regulatory agencies and regulated associations as part of a necessary process of communication between the regulatory authority and the regulated entity on matters of vital public concern to that governmental, regulatory relationship. Therefore, any of such statements or activities by regulated associations constitute a

privileged exercise in the course of a governmental, regulated relationship of constitutional freedoms secured by First Amendment.

The Supreme Court has held that purely commercial speech even by a corporation is protected under appropriate circumstances by the First Amendment to the Constitution. Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc., 425 U.S. 748 (1976); Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980). Neither the federal government nor the state government may constitutionally impose a legislative or judicial rule which infringes on freedom of commercial speech, especially in matters of significant public importance.

Here, any discussions concerning the qualifications of top managing officers would relate to a matter of obvious mutual interest and high public importance, both for the association and for the regulator; and would be protected by constitutional safeguards for

freedom of commercial speech in the course of a governmental, regulated relationship on a matter of mutual concern and public importance. Clearly, no form of commercial speech could be more vitally deserving of protection, or more important to the public, than a communication between an association and Department (or the FBI or any other law enforcement or regulatory authority) on whether an individual considered for possible employment as a top managing officer of a fiduciary institution has the special qualifications of honesty, integrity, experience and ability needed for that high fiduciary office. If an association cannot contact Department for such information, then it is difficult to see what reasonable minimum steps any association could take to ensure high quality in the person it selects for a top managing officer position. Any converse ruling would have extraordinary, irrational and far-reaching consequences for the savings and loan industry, the banking industry, and every other

industry that has to fill the position of an officer having highest fiduciary responsibilities.

Right of Petitioning Government under Noerr-Pennington Doctrine

Moreover, Associations' conduct in contacting Department for information on a prospective top fiduciary manager should be accorded protection under the Noerr-Pennington doctrine that acts of Congress cannot be interpreted to infringe upon First Amendment freedoms of petitioning government. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 669 (1965). The Sherman Act cannot be interpreted to restrict or infringe upon the exercise of First Amendment freedoms of petitioning government for vital information; nor can the civil rights statute, §1983, be interpreted to infringe upon First Amendment freedoms.

Chilling Effect on First Amendment Freedoms

Assuming that any communications between

Associations and Department were protected under the First Amendment, as the Circuit acknowledges, the Circuit's opinions would nevertheless have a dangerous chilling effect on Associations' First Amendment freedoms by subjecting them to punishment in damages for exercising their First Amendment freedoms and performing their high public duties of investigation. The opinions force Associations into a rending, Catch-22 dilemma: The Circuit has stated Associations have a constitutional right to contact the Commissioner for information on prospective top fiduciary officers; that Associations would be remiss if they did not investigate the candidate's character; that the Circuit applauds the practice of asking Commissioner for information; but that they commit civil rights violations and can be punished in damages if they listen to what Commissioner says.

Such a result is egregiously unfair, wrong and illogical for four reasons. First, if

Associations had a constitutional right or high public duty to ask Department for information, they logically and necessarily had the constitutional right or high public duty to listen to any information received. Moreover, if an Association received adverse information concerning the background and qualifications of an individual under consideration for a job as top managing officer of a fiduciary institution, the Association and its directors would clearly have had the right to act accordingly in the exercise of their own business judgment. Obviously an Association which had received adverse information from its regulating authority concerning a possible candidate for top managing officer would have had no duty enforceable in damages by Plaintiff to conduct a mini-trial on the accuracy of the information from the regulating authority; or to demand that Department reveal the exact nature and confidential sources of the adverse information; or to call and question

witnesses; or to make any determination of its own concerning the accuracy of the information received; or to disregard any adverse information received from Commissioner; or to accept Phillips' word over Commissioner's.

Second, Associations obviously had no knowledge in advance and no control over what Department would say -- whether it would be favorable, neutral or adverse; or where it would be along the seamless spectrum from "pure" facts (if any exist), through facts scented with qualitative opinions and judgments, through opinions or recommendations to hire or not, to statements that the hiring was "approved" or not. Neither the Circuit, nor Plaintiff, nor any of the evidence has ever suggested Associations had any knowledge of, or control over, what the Department would say when asked for information. Having asked the question that had to be asked, Associations could not reasonably have been expected to avoid listening to any part of the answer and should not now be threatened with

actual and punitive damage exposure for not having done so. Once having heard, how could they unring their own bell?

Third, Associations had no knowledge or control over whether Commissioner or Department granted or denied Plaintiff a hearing. Neither the Circuit, nor Plaintiff, nor any of the evidence has ever suggested Associations had any knowledge or control over whether Department granted or denied Plaintiff a hearing. (Conversely, Circuit ignores the fact Commissioner, a state official, had no control or authority over First Federal of Luling.)

Fourth, such a result fails to give Defendants' First Amendment freedoms the breathing room which they constitutionally require. Defendants should not be condemned to the continuing anxiety of worrying whether a jury years in the future would decide Department's information had been in effect a negative recommendation; that it had been too far along the continuous spectrum between information and recommendation; that Department

had been exerting too much de facto control over hiring; or that Department's adverse information, in practical effect, was the same as an adverse recommendation or a flat statement of disapproval. Associations are no better equipped after Circuit's decision than they were before it to predict reliably those matters. The opinion means they must perform their constitutionally protected investigative functions never knowing when they have stepped over the invisible line and subjected themselves to multi-million dollar claims.

The painfully exasperating irony of Associations' position under the Circuit Opinion is that the Circuit applauds and then damns Associations for precisely the same objective conduct -- asking and then listening. As a practical matter, it would have been simply impossible for Associations to exercise their constitutional right and ask their question, and when they had heard the adverse response, to avoid damage exposure if they did not hire the candidate in question.

Even if a particular Association wanted Plaintiff to have a full-blown adversarial hearing, its objectively considered conduct would have been exactly the same as the acts and conduct of an association that (1) wanted Plaintiff not to have a hearing or (2) never thought about a hearing or (3) considered it to be a matter solely between Plaintiff and Department.

Because the Circuit's opinions do not permit Associations or anyone else to distinguish between constitutionally protected conduct and conduct punishable in damages, the Circuit cannot avoid a severe chilling effect from the present opinions in this case however much they may wish it were not so. A proper analysis of the crucial public interest supporting Defendants' First Amendment freedoms in this regard, either with or without a balancing of competing interests, would declare Associations' actions protected under the First Amendment and not punish them in damages for such actions. Although the

Circuit's second opinion professes to give Associations the benefits of First Amendment protection, the opinions effectively strip Associations of that protection by subjecting them to punishment in damages for commendable and constitutionally protected conduct.

"Congress shall make no law...abridging the freedom of speech...." under the First Amendment; and §1983 cannot be interpreted to accomplish the absolutely prohibited result of awarding money damages against legitimate and vitally necessary free speech.

Constitutional Privilege Also a Defense Against Tortious Interference Claim

The constitutional privilege under the First Amendment that should protect Associations from Plaintiff's civil rights claim is also a fully adequate defense against the tortious interference claim. Privilege is a well recognized defense under Texas law to tortious interference claims. Terry v. Zachry, 272 S.W.2d 157 (Tex. App. 1954, writ ref'd n.r.e.); Leonard Duckworth, Inc. v. Michael L.

Field & Co., 516 F.2d 952, 956 (5th Cir. 1975). Such a privilege is particularly appropriate here where the evidence shows Associations at most communicated only with Department concerning Plaintiff and made no communications with each other or with any third party concerning Plaintiff. Ph. 90-1, 105-6, 188.

2. The Circuit erred in holding that Associations could have conspired as "willful participants" who intended to deny Plaintiff a hearing on Department's information in joint activity with Department where the evidence shows Associations did not request or agree that Department deny Plaintiff a hearing, and had no control or knowledge as to whether Department denied Plaintiff a hearing.

No Evidence of Conspiratorial Intent by Associations to Deny Plaintiff a Hearing

Besides denying Associations the benefits of First Amendment protection, the Circuit opinions are founded on a crucial conceptual flaw in defining the alleged wrongful conspiracy, resulting in a fatal misevaluation of the evidence. Concerning the evidence on any alleged conspiracy by Associations to deny Plaintiff due process notice and hearing, Plaintiff himself testified in his deposition, 90-1, that he knew of no communications between any Defendants other than communications between a particular Association and Department, and he had no belief there were any such communications between any savings and loan Defendants. Plaintiff and Defendants deposed until the world was flat, but Plaintiff was never able to develop the slightest evidence that any Association ever requested Department to deny a hearing; or ever discussed with Department that Plaintiff be denied a hearing; or ever tried to influence Department to deny Plaintiff a hearing; or ever wanted or intended that Department

deny Plaintiff a hearing; or ever had any power, knowledge or control over whether Department did or did not grant Plaintiff a hearing.

Granting that the Circuit's target is the practice of de facto licensing without due process notice and hearing, the Circuit fails to distinguish between the two conceptually distinct and functionally separate phases of such a practice: (1) constitutionally protected communications between Associations and Department in which Associations are alleged to have participated; and (2) Department's decision to grant or deny Plaintiff due process notice and hearing, in which Associations had no participation whatever.

Yet, in discussing Associations' alleged liability for conspiracy, the Circuit, at 1226, loosely states Plaintiff "must show that the Associations were willful participants in the industry custom of de facto licensing," without mentioning the phase (2) denial of notice and hearing, which under its own

analysis is the only factor rendering the custom wrongful. The Circuit went on to state that there appeared to be a genuine issue as to "whether the savings and loan associations were willful participants in the custom" (still broadly drawn and with no reference to the specific due process feature of notice and hearing), and concluded that the record "shows that each Association contacted the Department regarding Phillips and subsequently refused further consideration of him."

Thus, according to the Circuit's wide-swinging, broad-brushing use of the term "custom," any participation by Associations in that broad and ill-defined "custom" would subject Associations to punishment in damages, regardless of whether their participation was only in the first and constitutionally protected phase of communication, and regardless of whether Associations had any participation, knowledge or control as to the second phase of granting or denying Plaintiff due process notice and hearing. The Circuit's second

opinion at 724 F.2d 491, 493, makes exactly the same conceptual error by stating Defendants were liable if they participated in "Vandygriff's de facto licensing procedure," without requiring that Defendants have knowingly participated in denying Plaintiff due process notice and hearing.

Thus, the Circuit's opinions have tried to fuzz together two conceptually distinct areas of conduct into a single conspiratorial scheme; have used general terms for the alleged scheme which emphasize only Defendants' constitutionally protected activity and de-emphasize the alleged denial of notice and hearing; and have therefore been satisfied with finding evidence merely that Associations participated in the broad-brushed industry "custom" and without any evidence of participation by Defendants in any intentional or knowing denial of notice and hearing.

Such a fuzz-em-together definition of the alleged conspiracy is wrong for four reasons. First, it subjects Associations to punishment

in damages even though the evidence shows their conduct was not only innocent, not only praiseworthy, but constitutionally protected under the First Amendment.

Second, the Circuit's definition of the alleged conspiracy is wrong because as a practical matter Associations who contacted Commissioner had no viable choice as to whether to opt in or opt out of the alleged conspiracy. If they were interested in hiring Plaintiff as a top managing officer, they had a duty to investigate fully his qualifications, and the single best information source was Commissioner. Once they contacted Commissioner for information, they had no means or opportunity to either opt in or opt out of the alleged conspiracy to deprive Plaintiff of notice and hearing. Moreover, even if, contrary to the evidence, they had known Commissioner intended to deny Plaintiff a hearing, they still could not ignore their own high duty to investigate the qualifications of top managing officers by contacting

appropriate sources, such as Commissioner. They would still have been under a duty to investigate fully and make contact, knowing that Plaintiff could still pursue his own remedies against Commissioner, as discussed below.

Third, Associations had no control whatever over whether Commissioner or Department granted or denied Plaintiff notice or hearing. Any decision to grant or deny a hearing beyond any doubt and beyond any dispute in the evidence was uniquely Commissioner's decision.

Fourth, the Circuit's broad-brushed definition of the alleged conspiracy is wrong because the evidence shows Associations had no evil intent as to Plaintiff and no intent to deny him notice or hearing. Phillips admitted in his deposition that Associations told him he had a problem with Department and he should get it squared away. Moreover, the Circuit's opinion expressly acknowledged Associations had no evil intentions as follows:

> "These problems with the custom, however, are procedural rather than substantive. We certainly do not condemn the basic motivation for the custom: ensuring that managing officers of savings and loans are of the highest character and competence. The virtue of these good intentions is sufficient to save the practice from the fiery pit reserved for per se antitrust violations." (Emphasis added), 1231.

Such words come as a puzzlement and as extremely cold comfort to Associations when the Circuit in the very next paragraph orders them back to stand trial for damages for doing only what they with the best of intentions thought was right.

None of the Circuit's cited conspiracy cases provides any basis at all for keeping Associations in this lawsuit. Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970) (race discrimination); United States v. Price, 383 U.S. 787, 794 (1966) (18 U.S.C. §241-2 criminal conspiracy to release from jail and murder); Earnest v. Lowentritt, 690 F.2d 1198, 1200 (5th Cir. 1982). None of these cases involved an alleged conspiracy defendant who

had an acknowledged First Amendment right to do what he did; none involved an alleged conspiracy defendant who had a high public duty to do what he did; none involved an alleged conspiracy defendant who could not opt in or opt out of the alleged conspiracy; and none involved an alleged conspiracy defendant acting with acknowledged commendable intentions and no intent to cause any illegal result. Consequently, these conspiracy holdings developed under wholly different factual particulars to protect against racial discrimination and murder need not be mechanically applied in this case to punish conduct which the Circuit applauds.

The Supreme Court has held that civil liability for conspiracy may not be imposed merely because an individual belonged to a group, some members of which committed wrongful acts. "For liability to be imposed by reason of association alone, it is necessary to establish [1] that the group itself possessed unlawful goals and [2] that

the individual held a specific intent to further those illegal aims." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982) (cases cited). Here, the only feature of the alleged industry custom which the Circuit found to be objectionable was the alleged lack of due process notice and hearing; but the evidence showed that none of the Associations had any intent for Commissioner to deny Plaintiff due process notice and hearing, and the Circuit acknowledged the custom was followed with the best of intentions by Associations.

3. The Circuit erred in selecting the wrong remedy against the wrong defendants for the alleged civil rights violations -- subjecting Associations to actual and punitive damages for their praiseworthy conduct in requesting information from Department on prospective top fiduciary managers, rather than simply according Plaintiff his

remedies as to Department either by injunctive or declaratory relief or by administrative hearing.

Wrong Remedy Against the Wrong Defendants

Although the Circuit remands this case to the trial court for a complicated factual determination concerning Department's alleged de facto licensing without due process, the Circuit gave little attention to the problem of selecting the right remedy and fitting it to the right defendant. Here, a damage remedy against Associations is the wrong remedy against the wrong Defendants for five vitally important reasons.

First, it punishes Associations for exercising constitutionally protected First Amendment freedoms.

Second, it punishes Associations for Commissioner's conduct in allegedly denying Plaintiff notice and hearing when Defendants had no control over Commissioner's decision.

Third, any problems with the alleged custom "are procedural rather than substantive," as

the Circuit itself recognized in approving the basic intentions behind the custom at 1231. That being so, any procedural problems can be protected by changing Department's procedures when responding to requests for information, and do not require penalizing associations who contacted Department for information.

Fourth, if Plaintiff had been genuinely interested in correcting Commissioner's false reports or in obtaining due process, he could have swiftly obtained relief by way of injunction, declaratory judgment or administrative proceeding that would have solved his problem under the stigma-plus doctrine. Board of Regents v. Roth, 408 U.S. 564 (1972); Codd v. Velger, 429 U.S. 624 (1977). If Commissioner was hampering his employment prospects by false reports, Plaintiff could quickly have obtained an injunction against Department and Commissioner under accelerated procedures for injunctive relief, requiring that Department and its agents (1) stop making adverse comments about

Phillips' qualifications as a top managing officer of an association; and (2) withdraw and correct any adverse comments previously given. Similarly, if Commissioner was engaging in actionable de facto licensing without due process notice and hearing, Plaintiff could immediately have obtained either (1) an injunction ordering Commissioner to give notice and hearing, or (2) administrative hearings and appellate remedies under the Texas Administrative Procedure and Texas Register Act. App. G-2. Any of these remedies would have given Plaintiff swift, sure relief on any valid, provable claim way back in 1978 -- more than three years before his 1981 jury trial for damages.

Thus, the existence of other adequate remedies by injunction, declaratory relief or administrative hearing would mean that the courts are not required in this case to clamp on the §1983 damage remedy in rigid, lock-jaw fashion, especially where these alternate available remedies are more closely tailored

and more rationally connected to the targeted problem of alleged denial of due process notice and hearing than the big-bucks damage remedy. Parratt v. Taylor, 451 U.S. 527 (1981) (§1983 damage remedy not applied where other state remedies available).

However, the only remedy Plaintiff has ever pleaded for is to shoot the moon in damages against the deep-pocket defendants. Plaintiff learned he had a problem with Commissioner's office and obtained a special conference with Commissioner which he considered satisfactory. Plaintiff never again requested any type of informal conference or formal hearing with Department even after he learned he was still receiving adverse reports, and never again talked with Commissioner. Ph. 113.

Fifth, none of the Circuit's cases allegedly supporting its new theory of de facto licensing without due process declare that a proper remedy for Department's de facto licensing without due process under these circumstances would be a damage judgment

against private defendants. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (board action denying right to take bar examination appealed to Supreme Court); Board of Regents v. Roth, 408 U.S. 564 (1972) (action for declaratory and injunctive relief); Truax v. Reich, 239 U.S. 33, 41 (1915) (injunction); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (criminal appeal); Greene v. McElroy, 360 U.S. 474, 492 (1959) (declaration and restraining order); Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173 (5th Cir. 1971) (injunction). All of these cases deal with other remedies, primarily the injunction, a remedy which is uniquely appropriate for an unwitting procedural due process violation.

§1983 does not necessarily imply a right to recover money damages in all circumstances, and in some cases the remedy of damages should be denied and injunctive and declaratory relief are adequate. Jacobson v. Tahoe Regional Planning Agency, 474 F.Supp. 901, 903

(D.C. Nev. 1979); Gresham v. City of Chicago, 405 F.Supp. 410, 412 (N.D. Ill. 1975).

In this sensitive area involving investigation functions vital to the public and important First Amendment freedoms, the courts should not employ means that broadly stifle fundamental liberties when the end can be more narrowly achieved. NAACP v. Claiborne Hardware Co., supra. Here, the courts have a number of more narrowly focused remedies such as injunctions, declaratory judgments and administrative hearings that would effectively cure any procedural due process problem without punishing Defendants in damages for exercising legitimate freedom of speech. The courts can use a scalpel, rather than a broadax, and they can use it on the right patient.

4. The Circuit erred in holding that Associations could have denied Plaintiff a protected liberty or property interest in becoming the top managing officer of a savings and loan association by requesting

and listening to Department's truthful information where Plaintiff had never before served as top managing officer in the savings and loan industry and had not worked in the industry for two years.

No protected liberty or property interest

Concerning Plaintiff's claim to a "protected liberty or property interest," three critically important facts remain erroneously stated or unstated in the Circuit's Opinions. First, the Circuit states Plaintiff "worked periodically in the savings and loan industry from 1968 until 1977," at which time an unrelated business venture proved unsuccessful and Phillips attempted to reenter the savings and loan industry. 1219. Actually, Phillips testified he left the savings and loan industry in early 1975, and did not attempt to reenter the industry until 1977 after an absence of two years. Tr. 44, 52. Second, although the Circuit recognizes Plaintiff in 1977 was trying to re-enter the industry as a

top managing officer, the Circuit omits to state he had never before held the top managing officer position. The highest position Plaintiff had ever held was vice-president in a small association having a president and two vice-presidents; he had never been president and had never been in charge of hiring. Tr. 42; Ph. 250, 259. Third, after these various other problems with Department and Commissioner, Plaintiff still got a savings and loan industry job with Civic Savings in Irving involving loan service work, although he decided not to work full time for them and later quit for his own reasons. The annual Civic Savings salary would have been $18,000, which was higher than his salary of $15,000 when he had last worked in the savings and loan industry. Tr. 136, 139; Ph. 17.

Bearing these facts in mind, the Circuit's holding is based upon an improper application of §1983 to Associations, in large part to protect an interest that does not exist under the modern authorities. Plaintiff lacks the

necessary liberty interest to afford him the relief suggested by the Circuit. The opinion states that the first step in determining whether Phillips has a legally cognizable claim under §1983 is identification of the liberty interest allegedly infringed by Defendants' actions, and identifies Phillips' interest as freedom to pursue "common occupations." The source of this interest, according to the cases relied upon by the Court, is the Fifth Amendment's due process clause. This holding is erroneous, because any such interest, if it exists, is not rooted in the Fifth Amendment.

The cases relied upon by the opinion do not support its holding that the Fifth Amendment's liberty interests include a right to pursue "common occupations." Meyer v. Nebraska, 262 U.S. 390 (1923), is the only case in which the Court's discussion of a liberty interest encompassing pursuit of occupation was critical to its holding. That case, however, was decided in 1923, in the so-called era of

substantive due process, when the Bill of Rights had not yet been incorporated into the Fourteenth Amendment's due process clause and the Court is recognized to have been over-zealous in its definition of the interests encompassed by the due process clause. See United States v. Carolene Products Co., 304 U.S. 113 (1937); Nowak, Constitutional Law, Ch. 13, Part V (1978).

More recent Supreme Court cases such as Board of Regents v. Roth, 408 U.S. 564, 576-8 (1972), and Paul v. Davis, 424 U.S. 693, 710-1, 722 (1976), have made clear that the interests protected by the Fourteenth Amendment's due process clause must be rooted in state law or in the Bill of Rights, as it applies to the states. Thus, to the extent that Meyer stands for the proposition that the Fifth Amendment creates a substantive liberty interest which must be protected by the Fourteenth Amendment's guarantee of due process, Meyer has, in effect, been overruled. Under the modern rule, there must be a denial

of a right or status previously recognized under state law or there is no actionable violation. Moore v. Otero, 557 F.2d 435, 437 (5th Cir. 1977).

Other cases relied upon by the opinion, Truax v. Raich, 239 U.S. 33 (1915) (plaintiffs' right to be free from racial and national origin discrimination, not right to pursue career), Greene v. McElroy, 360 U.S. 474 (1959) (federal government could not infringe right to pursue career in government-related business; existence vel non of right not contested by Government), and Ferrell v. Dallas Independent School District, 392 F.2d 697, 703-4 (5th Cir.) (defendant's action had not interfered with any right; existence vel non and source of right immaterial to holding), cert. denied, 393 U.S. 856 (1968), are cases in which the court's recitation of the liberty interest in career pursuits was dictum. To the extent that any of these cases might be read as endorsing the view that the Fifth Amendment contemplates

career pursuit as a liberty interest protected by the Fourteenth Amendment's guarantee of due process, such a theory has been rejected by the Supreme Court in Roth and Davis.

The modern analysis of Roth, Davis and other cases requires that the plaintiff claiming a liberty interest must show an interest protected by state law or the Bill of Rights. Neither Texas law nor the Bill of rights created in Phillips a liberty or property interest in his desire to be top managing officer of a savings and loan association when he had never served in such a capacity and in an industry from which he had been absent for two years. Other cases cited, Shaw v. Hospital Authority, 507 F.2d 625 (5th Cir. 1975), and Daly v. Sprague, 675 F.2d 716, 726-8 (5th Cir. 1982) (held doctor had no liberty interest in clinical privileges as matter of law and no claim under §1983), recognize that due process rights must relate to interests created by some other source such as state law. Thus, neither Texas law nor the

portion of the Bill of Rights applicable to the States creates a protectable liberty interest in Phillips' pursuit of a manager's job in a Texas savings and loan association. Because Phillips lacks the requisite interest, there is no civil rights claim.

Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957), upon which the Circuit based its holding of a protected interest, has elements of substantive due process and thus has been superseded by the more recent cases. Schware, at most, holds that the state may not exclude an individual from a statutorily restricted and licensed profession for reasons that violate due process or equal protection, circumstances not present here. The relief granted in Schware was that petitioner be permitted to take the bar examination, not that private parties be liable in damages for the board's failure to afford due process.

Truth as Defense on Civil Rights Claim

The Circuit recognized in its opinion that Plaintiff would have had a civil rights

claim against Commissioner if Commissioner's false statements about him prevented him from getting a job in his industry. Codd v. Velger, 429 U.S. 624 (1977) (plaintiff must prove government-imposed stigma was caused by false communication to recover under §1983). The Circuit recognized at 1224 that Plaintiff had not made out a stigma-plus §1983 claim under Codd v. Velger because the jury found Commissioner's adverse statements were true, but nevertheless insisted Plaintiff was entitled to recover under a newly minted theory of de facto licensing without due process notice and hearing, regardless of whether the statements were true or not. Associations suggest Codd v. Velger applies and controls, and that the truth of the alleged stigmatizing statements would constitute a defense to a §1983 claim.

First, the mechanism that allegedly prevented Plaintiff from getting a job as top managing officer in the industry is more accurately described as the Codd v. Velger

government-imposed stigma mechanism, involving adverse information circulating in the industry from a government source, rather than a true licensing system as discussed in Schware. The Codd stigma is exactly what Plaintiff was claiming and pleading here.

Second, Plaintiff took a full and fair shot on his theory that he was damaged by false and stigmatizing statements by Commissioner; testified the statements were false and that they stigmatized him, Tr. 142-3; and simply lost that claim fair and square when the jury found Commissioner's adverse statements about him were absolutely true. Indeed, Phillips had already admitted repeatedly in his deposition that the statements made by Commissioner to Associations that he was having troubles with Department, were literally true.

Third, although the Circuit totally ignored the jury's finding of truth in discussing its de facto licensing theory, the obvious fact remains that all the due process in the world

could not have helped Plaintiff one bit if Commissioner's adverse statements about him were true; and the statements were in fact true. Five solid pages of due process notice and hearing rules and five solid days of formal hearings would not have changed Commissioner's statements from being truthful to being false. Commissioner stated Plaintiff was associated with persons involved in illegal activity in Sinton Savings; and that Plaintiff's own financial affairs were in trouble. Ph. 110, 85, 89, 141; Tr. 117-20. The Circuit apparently disagreed with the jury and found Plaintiff was not involved in the Sinton Savings misconduct; but the jury found the statements to Associations about Sinton involvement were true. Plaintiff admitted his financial affairs and personal debts were in trouble, but argued that the poor state of his financial affairs and whether he was under financial pressure had no connection with his competence in running the affairs of an association. Ph. 85-7, 141. Such facts could

be relevant considerations to a savings and loan association in a small community that wants its financial affairs run in a tight, neat fashion by a president with a spotless reputation.

Now that Plaintiff is bound by a determination that Commissioner's adverse statements were true, R. 862, and since there is no reason to believe additional notice and hearing would have helped Plaintiff prevail in the face of Commissioner's adverse, truthful statements, Plaintiff's civil rights claim should be held barred under the controlling rule of Codd v. Velger.

CONCLUSION AND REQUEST FOR RELIEF

The Circuit's opinions in this case set a new, dangerous and alarming precedent which the Supreme Court must not permit to stand. Its holding that Associations could be punished in damages for requesting information from the Texas Savings and Loan Department on a prospective top managing officer, would surely have a severe and impermissible

chilling effect on vital communications acknowledged by the Circuit to be protected by the First Amendment; would discourage Commissioner's successor and all other similar public officials from giving out vitally needed information on prospective top fiduciary managers; and would discourage associations, banks and other fiduciary institutions from asking the crucial questions they must ask to ensure that top fiduciary managers enjoy a reputation for the highest competence, honesty and integrity.

The decision radically distorts accepted rules governing conspiracy liability by subjecting Associations to damage penalties when the evidence plainly showed they had no knowledge or control as to Commissioner's decision to grant or deny Plaintiff a hearing; that they had no power to opt either in or out of the alleged conspiracy after they had performed their constitutionally protected communications with Department; and that Associations participated in any industry

custom only out of the best intentions and a sense of high responsibility to their depositors and shareholders and to the public.

Rather than tailoring and adapting their remedy to the particular procedural due process problem presented, the Circuit opinions now threaten Associations with damage penalties for their praiseworthy conduct in requesting information from Department on prospective top fiduciary managers, rather than simply recognizing Plaintiff's procedural due process remedies as to Department either by injunction, declaratory judgment, or administrative hearing.

The Circuit erred in holding that Associations could have denied Plaintiff a protected liberty or property interest in becoming the top managing officer of an association where Plaintiff had never before served as top managing officer in the savings and loan industry, had not worked in the industry for two years, and was later able to obtain a savings and loan industry position at

a higher salary than he had previously enjoyed. Moreover, the fact that Commissioner's adverse statements about Plaintiff were true should protect Defendants from any §1983 liability under Codd v. Velger and underscores the inappropriateness of hurling a new liability theory against an applauded industry custom in favor of a plaintiff who has pleaded only for high-dollar damages and never for procedural due process relief. It is extraordinary, stunning, and bewildering that in this case the Circuit has strained itself to enforce a cause of action in damages against public officials and fiduciary institutions for speaking, and listening to, the adjudicated truth, however unpalatable it may be to Plaintiff.

WHEREFORE, Associations request the Supreme Court to grant this Petition; reverse the Circuit's decision; affirm the District Court's Judgment in favor of these Associations; and order that Defendants

recover costs and all other relief to which they are entitled.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1552

EDWARD N. PHILLIPS,
Plaintiff-Appellant,

versus

ALVIS VANDYGRIFF, ET AL.,
Defendants-Appellees.

ON PETITIONS FOR REHEARING

(March 26, 1984)

Before BROWN, GOLDBERG, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Our prior opinion denying rehearing to all but one party clarified, but did not alter, our original holding in this case; the outcome was not thereby affected except in the dismissal of North Texas Savings Association as a defendant. It follows that the petitions for rehearing filed by Mainland Savings & Loan Assn. and First Federal Savings & Loan Assn. of Luling are untimely, Fed. R. App. P. 40(a), and they are dismissed.

Phillips asks us to reconsider our statements about the meeting he had with Vandygriff in which they discussed the Sinton S & L affair. Because our prior opinion denying rehearing was meant to explicate the legal principles enunciated in our original opinion, we did not extensively review the record to make factual findings. We suggested lines of argument which might be pursued by the parties on remand, but we did not

intend in any fashion to preempt the fact-finding function of the district court. It remains open to the parties on remand to develop the facts for review and determination by that court. Phillips' petition for rehearing is DENIED.

APPENDIX B

Edward N. PHILLIPS,
Plaintiff-Appellant,

v.

Alvis VANDYGRIFF, et al.,
Defendants-Appellees.

No. 81-1552

United States Court of Appeals,
Fifth Circuit.

Feb. 6, 1984.

Appeal from the United States District Court for the Western District of Texas.

ON PETITIONS FOR REHEARING AND
SUGGESTIONS FOR REHEARING
EN BANC

(1983, 5 Cir.1983, 711 F.2d 1217)

Before BROWN, GOLDBERG and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

In our original opinion, we reversed the judgments that had been entered for defendant Vandygriff and certain of the savings and loan association defendants on the claims charging violation of section 1983 and unlawful interference with plaintiff Phillips's livelihood. We affirmed the judgments entered on behalf of defendant Paris Savings & Loan on all claims raised against it, as well as the judgments for all the defendants to the antitrust claims. All parties except Paris S & L now petition for rehearing. Phillips's petition lacks merit and is hereby denied. Except as expressly noted, the petitions of the

defendants are also denied, but because they have raised questions as to the scope of our original holding, we take this occasion to address more fully the reach of the de facto licensing doctrine we have enunciated in this case.

[1,2] The de facto licensing doctrine is, of course, not a guise for the "stigma-plus" cause of action. The stigma-plus line of cases stemming from *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), makes plain that that claim arises when representations made by the defendant injure the plaintiff both in his reputation and in some related, more tangible form that renders the injury compensible. In *Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977), the Supreme Court held that the representations made by the defendant must be false in order to give rise to a claim under this stigma-plus doctrine. Here, the represenations made by Vandygriff about Phillips were found to have been true, and we held accordingly that Phillips could not recover under the stigma-plus theory.

De facto licensing, by contrast, turns not on the ultimate truth or falsity of the representations, but on their absolute exclusionary effect. The injury done to the plaintiff is not in the harm to his reputation per se, but in the denial to him of the hearing to which he would have been entitled under due process were the licensing process actual rather than constructive. From this it follows that a constructive licensing scheme may be discerned only if *approval* by the governmental regulating body or official is the virtual *sine qua non* of employment within the industry, so that the effect on an applicant of this unofficial proceeding is much the same as the effect of an official licensing proceeding.

[3] We have noted in our original opinion that we did not wish to chill any practice by which savings and loan associations consult with the savings and loan commissioner about the qualifications and reputation of applicants for managerial positions. No one suggests that such a practice does other than ensure the integrity of persons holding positions of trust and responsibility, and thereby serve an important public interest. Such communications also have the benefit of First Amendment protection.

[4] Our concern is only that the commissioner's informal endorsement may in practice become a prerequisite for employment within the industry. If so, the applicant, who plainly has a protectable interest in not being arbitrarily or discriminatorily denied the opportunity to practice his profession, *see Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), must be granted the due process protections necessary to uphold that interest.

[5] We have declined to determine now the precise scope of the due process rights possessed by an applicant confronting a de facto licensing process. We noted in our original opinion that, at a minimum, due process guarantees to an applicant facing a licensing process notice and an opportunity to be heard. Here, though Phillips received no formal notice, he evinced an awareness of the practice by savings and loan associations to consult witht he savings and loan commissioner. Additionally, Phillips was evidently not denied access to Vandygriff to clarify his role in the Sinton S & L incident. In fact, Phillips did ultimately meet with Vandygriff to discuss this matter, and the commissioner thereafter evidently dropped his objections to Phillips's employment within the savings and loan industry. We leave it to the district court, in the first instance, to decide whether this form of accessibility could fulfill the requirements of due process, or whether a more formal type of hearing was required.

[6] The defendant savings and loan associations have noted that they were not in a position to grant Phillips a due process hearing, and they therefore urge us to preclude liability on their part. This we cannot do. If Phillips was deprived of his due process rights by Vandygriff's de facto licensing procedure, and if the savings and loan associations participated in that procedure, they can be held liable as co-conspirators.

[7] The first question to be addressed by the district court on remand, of course, is whether there in fact existed here a de factor licensing process. In making this determination, the district court should take into account the regularity with which savings and loans sought the commissioner's opinion of prospective managerial employees, the extent to which they

followed his recommendations, and the degree to which they believed the commissioner was placing the authority of his office behind his recommendations—particularly, whether the savings and loans believed that they would be prejudiced in their dealings with the commissioner's office if they hired a manager who had not won the commissioner's prior approval. If, taking these elements into account, the district court determines that this system effectively equated to an actual licensing scheme, it should declare that the commissioner was engaged in de facto licensing, and it should then determine what procedural protections were required to be provided the applicants under review.

The distinction is ultimately between a system that imparts information weighed by the hiring agency and a system where hiring turns on the approval of the hiring decision by the state. It is not a matter of semantics or the words used. It is a matter of whether the sum of the evidence is that the state holds a veto over the private hiring decision.

[8] North Texas Savings Association argues that the jury's finding that Wright's imparting of information was not a cause of injury to Phillips entitles it to judgment because it obtained information only from Wright. The argument is well taken and the petition for rehearing is granted as to North Texas Savings Association. The judgments for it are affirmed.

No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc, the petitions for rehearing and the suggestions for rehearing en banc are DENIED except as expressly granted herein.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 81-1552

EDWARD N. PHILLIPS,
Plaintiff-Appellant,

versus

ALVIS VANDYGRIFF, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

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Before BROWN, GOLDBERG and HIGGINBOTHAM, Circuit Judges.

JUDGMENT ON REHEARING

This cause came on to be heard on the petitions for rehearing of the parties;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for rehearing of North Texas Savings Association is granted. The judgment of the said District Court appealed from is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded in part to the said District Court for further proceedings in accordance with the opinions of this Court. The remaining petitions for rehearing are denied.

IT IS FURTHER ORDERED that plaintiff-appellant pay 10% of the costs on appeal to be taxed by the Clerk of this Court; defendant-appellee, Alvin Vandygriff, pay 45% of said

costs; and appellee savings and loan associations pay 45% of said costs. No costs shall be taxed against defendants- appellees, Paris Savings and Loan Association and North Texas Savings Association.

FEBRUARY 6, 1984

ISSUED AS MANDATE: OP-JDT-14

APPENDIX D

Edward N. PHILLIPS,
Plaintiff-Appellant,

v.

Alvis VANDYGRIFF, et al.,
Defendants-Appellees.

No. 81-1552.

United States Court of Appeals,
Fifth Circuit.

Aug. 15, 1983.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, GOLDBERG and HIGGINBOTHAM, Circuit Judges.

GOLDBERG, Circuit Judge:

In this case we are called upon to review the consequences of an industry custom amounting to a de facto licensing of prospective managerial employees of state chartered savings and loan associations by the state savings and loan commissioner. We find that such de facto licensing implicates liberty interests under the fourteenth amendment and might create pendent state tort claims. It does not, however, amount to any sort of antitrust violation. Accordingly, we reverse in part and remand for further proceedings.

I. INTRODUCTION

A. Facts

Phillips, plaintiff-appellant, worked periodically in the savings and loan industry from 1968 until 1977. In 1977 an

unrelated business venture proved to be unsuccessful and Phillips attempted to reenter the savings and loan industry. Beginning in early 1977, Phillips entered into talks with agents and principals of the Sinton Savings and Loan Assosciation for a position as managing officer, and apparently an agreement in principal was reached between Phillips and Sinton. During this period Phillips and some of the Sinton principals met with defendant Vandygriff, Commissioner of the Texas Savings and Loan Department ("the Department"). Phillips never actually began work at Sinton, because of what the Sinton principals told Phillips were "internal auditing" problems. Phillips repeatedly contacted Vandygriff in an effort to find out the nature of Sinton's problems, but Vandygriff would not divulge that information to Phillips because Phillips was not formally associated with Sinton. Vandygriff did give Phillips the "fatherly advice," Record at 323, that Phillips remove himself from the "whole mess." Record at 76. Phillips apparently took this advice and advised Sinton to contact him if the problems were ever resolved.

These "internal auditing" problems in fact turned out to be severe irregularities including misuse of funds and issuance of commitments that could not be funded. As a consequence of these irregularities, two officers of Sinton were indicted in October 1978. When Phillips heard of the indictments, in an abundance of caution he voluntarily contacted the FBI to see if they were interested in him as well. He not only was not indicted, he was never even interviewed.

Phillips attempted to find other employment in the industry with several other savings and loans.[1] These attempts were unsucessful, Phillips claims, because of a custom in the industry of screening prospective managerial employees with Vandygriff. Vandygriff was disturbed by Phillips' proximity to the

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1. The other savings and loans were defendants Paris Savings and Loan Association, First Savings of Bowie, Exchange Savings and Loan Association, Mainland Savings and Loan Association, North Texas Savings and Loan Association, First Federal Savings and Loan Association of Luling, and Aztec Savings and Loan Association.

Sinton derelictions. Though Vandygriff did not actually suspect Phillips of wrongdoing, Vandygriff was unsure enough of the facts surrounding Phillips' involvement with Sinton that he withheld his recommendation. When prospective employers contacted Vandygriff about employing Phillips, Vandygriff told them two things. First, Vandygriff told them some version of the facts surrounding Phillips connection with Sinton. Second, Vandygriff told them he could not recommend Phillips for employment. Because of the industry custom, this withholding of a recommendation was enough to exclude Phillips from the industry.[2]

B. Procedure Below

On January 11, 1980, Phillips filed a complaint against the Texas Savings and Loan Department, Commissioner Vandygriff, former Deputy Commissioner Wright, and the seven savings and loan associations, *see supra* note 1. Phillips alleged five causes of action against the various defendants. First, Phillips claimed that the custom in the industry and Vandygriff's action constituted a group boycott, in per se violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). Second, Phillips claimed that he was libeled and slandered. Third, Phillips alleged that the defendants' actions constituted wrongful interference with contracts or prospective contractual relationships. Fourth, Phillips argued that the defendants conspired to interfere with his livelihood. Fifth, Phillips claimed that the defendants deprived him of his constitutional rights in violation of 42 U.S.C. § 1983 (1976). Phillips pursued all of the defendants under all of the claims, either for direct actions or for conspiracy.

Before trial each savings and loan association moved for summary judgment; the state defendants moved for partial summary judgment only with respect to the antitrust claim. The district court orally granted summary judgment on behalf of all savings and loan associations except Paris. At the close of

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2. These facts as presented were disputed. Phillips, however, won a jury verdict on his claim, *see infra* Part II.C, so we are presenting the facts in a light favorable to his claim.

plaintiff's and defendants' cases the remaining defendants—Vandygriff, Wright, the Department, and Paris—moved for directed verdict. Their motion for directed verdit was granted solely with respect to the antitrust claim.

The remaining claims against the remaining defendants went to the jury. The jury found for Wright and Paris, but found against the Department and Vandygriff on the Section 1983 claim. Phillips was awarded $35,000 each against Vandygriff and the Department. In connection with the slander and libel claim, the jury found that the information conveyed to the savings and loan associations was true.

After trial all parties moved for judgment. The Department was granted judgment based on its eleventh amendment immunity. The court granted Vandygriff judgment on the civil rights claim because of the jury finding in the slander and libel claim that the information conveyed was true, relying on *Codd v. Velger,* 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) (per curiam). All defendants received judgment on the remaining claims based on the jury verdict. Phillips now appeals.

C. Issues on Appeal

Phillips does not appeal the verdict on defamation or the judgments in favor of Wright, Aztec,[3] or the Department. Phillips, however, does appeal virtually everything else. First, he claims that his section 1983 cause of action is the procedural due process/licensing sort, not the *Codd v. Velger* sort. Thus, the trial court should not have granted Vandygriff judgment based upon *Codd.* Second, Phillips argues that by granting summary judgment to the savings and loan associations, the trial court deprived Phillips of a chance to place his per se antitrust claim before the jury. Finally, Phillips urges that the dismissal

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3. Aztec was a newly chartered savings and loan association, and Texas law explicitly grants the Commissioner the power to approve managing officers of newly chartered institutions. Tex. Civ. Stat.Ann. art. 852a § 2.01a (Vernon Supp. 1982). Thus, Phillips does not appeal the judgment for Aztec.

of the savings and loan associations deprived him of his section 1983 conspiracy claim and pendent state claims. We shall address these arguments in turn.[4]

II. DE FACTO LICENSING AND SECTION 1983

[1] Our review of Phillips' section 1983 claim is hampered by the fact that the defendants, plaintiff, and trial judge all held different theories of the cause of action. The defendants thought the claim was of the "stigma-plus" variety. *See Codd v. Velger,* 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) (per curiam). The plaintiff thought the claim was one of de facto licensing without due process. The trial court viewed the case as a hybrid when he sent it to the jury; after the jury returned a verdict, the trial court became persuaded by the defendants and entered a judgment in their favor. We shall investigate each of these views.

A. Defending Against Stigma-Plus

The defendants viewed this claim as one concerning a public official who communicated true facts about a person, which resulted in that person being unable to acquire employment. This characterization places Phillips' claim squarely within the ambit of a long line of Supreme Court cases dealing with reputation. If the facts communicated were true, however, these same Supreme Court cases protect the defendants.

[2,3] The two elements of a section 1983 claim are (1) deprivation of a federal right (2) under color of state law. 42 U.S.C. § 1983 (1976). Under the fourteenth amendment, people may not be deprived of life, liberty, or property by the states without due process of law. A section 1983 claim resting on the fourteenth amendment must first identify a protected life, liberty, or property interest.

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), established the principle that government-imposed stigma that closes job opportunities is actionable

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4. For a synopsis of the issues presented, the trial court's disposition, and our disposition on appeal, *see infra* note 12.

under section 1983. In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the plaintiff claimed his reputation had been injured by distribution of a flyer wrongly listing him as a known shoplifter. The Supreme Court then made clear the idea that reputation alone is not a protected liberty interest—a plaintiff must show stigma *plus* an infringement of some other interest. *See generally Marrero v. City of Hialeah*, 625 F.2d 499, 512-20 (5th Cir.1980) (stigma plus injury to business goodwill protected under state law states interest under section 1983). Finally, in *Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) (per curiam), the Court highlighted the fact that the plaintiff must prove that the stigma was caused by a *false* communication. In the case at bar, the defendant's basic defense was that although Vandygriff might have stigmatized Phillips, resulting in a loss of employment opportunities, Vandygriff never communicated anything that was false about Phillips.

B. Complaining about De Facto Licensing

Throughout the case, Phillips presented a very different view of his section 1983 claim from that of the defendants. Phillips' claim was that an industry custom had arisen, resulting in Vandygriff's having de facto licensing power over employment as a manager of a savings and loan in Texas. No savings and loan would employ anyone in a managerial position without Vandygriff's approval. Assuming this version of the facts, we shall now explore whether this claim is colorable as a matter of law under section 1983.

[4] *1. Liberty Interest*—The first question is whether pursuing employment as a manager of a savings and loan is a liberty interest. "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 42, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915). *See also Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 636, 67 L.Ed. 1042 (1923) ("Without doubt, ['liberty' in the fourteenth amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common

occupations of life....'"); *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957) ("A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.") (footnote omitted); *Greene v. McElroy,* 360, U.S. 474, 492, 79 S.Ct. 1400, 1411, 3 L.ED.2d 1377 (1959) ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment ..."); *Board of Regents v. Roth,* 408 U.S. 564, 573-74, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972) (respondent denied relief because "[t]he State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case.") This Circuit has also repeatly acknowledged the principle that a person has a liberty interest in pursuing an occupation. *See, e.g., Ferrel v. Dallas Independent School District,* 392 F.2d 697, 707 (5th Cir.1968); *Shaw v. Hospital Authority,* 507 F.2d 625, 628 (5th Cir.1975); *Daly v. Sprague,* 675 F.2d 716, 727 (5th Cir. 1982).

Phillips has claimed that he was excluded from work within Texas as a manager of a savings and loan association. Under these Supreme Court and Fifth Circuit cases, it is clear that Phillip's interest in that occupation is a liberty interest within the ambit of the fourteenth amendment.

[5] *2. Deprivation Without Due Process*—The second question regarding Phillip's claim is whether he was deprived of his liberty interest in occupation as a manager of a savings and loan association without due process of law. It is axiomatic that not all deprivations of protected interests are actionable; only deprivations without due process are actionable. *See, e.g., Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). The question before us now is whether deprivation through de facto licensing, through an industry custom of screening prospective managerial employees with the state commissioner, is an actionable deprivation.

The cases cited in the previous section establish a spectrum of deprivations that aids our review of the practice in question

in this case. The spectrum ranges from deprivation of liberty to pursue an occupation caused by actions specifically intended to have that effect, to deprivations that occur as a collateral consequence of other legitimate acts. At the "innocuous" end of the spectrum, excluding a person from an occupation by making true statements is not actionable. *Codd v. Velger,* 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) (per curiam). Thus, had Vandygriff merely passed on true information about Phillips, Phillips would have no cause of action. Conversely, excluding a person from an occupation by making false defamatory statements is actionable. *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

At the other extreme of the spectrum, excluding a person from an occupation by denying that person a license for practicing that occupation is clearly actionable. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). Similarly, denying a person collateral credentials or privileges practically necessary for pursuing an occupation is also actionable. *Greene v. McElroy,* 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) (denial of security clearance practically necessary for employment as defense contractor); *Sosa v. Board of Managers of Val Verde Memorial Hospital,* 437 F.2d 173 (5th Cir.1971) (exclusion of physician from hospital staff privileges). Of course, these "actionable" deprivations are actionable only when made "in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware, supra,* 353 U.S. at 238-39, 77 S.Ct. at 756.

[6] We are persuaded that de facto licensing is a deprivation of the sort that may permissibly be accomplished only in the right manner and for the right reasons. First, this is precisely the sort of deprivation that would benefit from procedural protections, such as notice of reasons and an opportunity to be heard.

> That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depends on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender

> an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Anti-Fascist Committee v. McGrath, 341 U.S. 123, 171-72, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The continuing validity of Justice Frankfurter's observations is well demonstrated by the facts of this case. Phillips was excluded from his chosen profession not by Vandygriff's knowledge of any unfitness on Phillips' part, but by Vandygriff's private determination of guilt by association.

Second, we find the difference between formal licensing and de facto licensing to be unimportant. If a Texas statute required that savings and loan managerial officers be screened by the Commissioner, and the Commissioner denied entry into the profession without notice or an opportunity to be heard, such a procedure clearly would be actionable. In this case we have the same basic procedure and result, but authorized solely by the assumption of power through industry custom. The absence of statutory authority for licensing cannot somehow lessen the demands of due process.

In short, we conclude that Phillips' theory of the events before us states a cause of action under the fourteenth amendment. The freedom to pursue any of the "common occupations" has long been held to be a liberty interest. Loss of that liberty interest through a custom of de facto licensing is a deprivation actionable under the fourteenth amendment. Finally, no party to this lawsuit has contended that the procedural protections of the fourteenth amendment, minimally notice and an opportunity to be heard,[5] were provided here.

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5. We do not suggest that the full panoply of fourteenth amendment procedural protections, such as representation by counsel and confrontation and cross examination of opposing witnesses, is required here. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 1157, 71 L.Ed.2d 265 (1982); *Mathews v. Eldridge*, 424 U.S. 319, 334-335, 96 S.Ct. 893, 902-903, 47 L.Ed.2d 18 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.ED.2d 484 (1972).

C. Trial of a Hybrid

We now have before us two legal theories of actions cognizable under section 1983. The first, the defendant's view, follows the "stigma-plus" mold. Under this theory, Phillips must prove that his opportunity to work as a managing officer of a savings and loan was foreclosed by false and defamatory statements by Vandygriff. The second, Phillips' view, is that this is a de facto licensing case. Phillips was excluded from the occupation of his choice by an industry-wide custom of screening prospective employees with Vandygriff. Being presented with conflicting views of the case, the trial judge fashioned a jury charged that combined elements of both theories.

The jury was correctly informed of Phillips' position:

> In this case, Phillips claims that there exists in the savings and loan industy in the State of Texas a custom by which prospective management employees are screened by the State of Texas Savings and Loan Department and that their employment is contingent on the approval of the Commissioner and Deputy Commissioner in the Department. Phillips claims that he was entitled to be free from the custom of having his qualifications screened by the Department and from having the Commissioner's opinion of his qualifications communicated to potential employers without his having notice of such communication or an opportunity to confront those persons who formed the opinion and to rebut any conclusions they [sic] may have been drawn about him before such conclusions were communicated to potential employers.

Record at 854. This charge, standing alone, quite clearly communicates the substance of Phillips' de facto licensing claim.

Unfortunately, this part of the charge did not stand alone. Phillips' de facto licensing claim was consistently spiced with a stigma-plus element. The jury was told that "[t]he 'liberty interest' which Phillips is claiming he lost is (1) the right to engage in or pursue a lawful occupation in the savings and loan industry, and (2) a loss of his good reputation as a result of

defamation by a public official." Record at 853. Later, the charge referred to "Phillips' interest in his reputation and his interest in pursuing the occupation of his choice." Record at 854. Finally, the key interrogatory put to the jury was: "Do you find that Vandygriff's communications were a cause in fact of Phillips' loss of reputation and inability to be employed in the savings and loan industry?" Record at 855. The jury answered this question "Yes." *Id.*[6]

After trial, the trial judge became convinced that *Codd v. Velger,* 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) (per curiam), required that Phillips plead and prove the falsity of Vandygriff's statements to recover under section 1983. See Memorandum Opinion and Order, Record at 949. The only definition of "defamatory" the jury received did not require that the communication be false. Record at 861. In an interrogatory relating to a pendant state defamation claim, however, the jury found that those communications were true. Record at 562.[7] Accordingly, the trial judge entered judgement in favor of Vandygriff.

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6. Phillips explicitly objected to the mixture of the two theories in the jury charge:

> The issues inquiring about whether or not the Defendants' [sic] acted under color of state law, et cetera, with respect to civil rights violations inquires whether or not the Defendants communicated information about Mr. Phillips to various savings and loan offices. We suggest it properly should be phrased as to whether or not the Defendants either directly refused to approve Phillips for positions with the various savings and loan associations or that they took actions which caused a refusal. That is the direct issue rather than the general inquiry of communicating information.

Transcript at 917.

7. There was much dispute at to whether or not the interrogatory regarding truth applied to the same statements at issue in the section 1983 cliam. The trial judge decided that the interrogatory did not apply to the same statements, but that the substance of the two sets of communications were the same. This dispute is not relevant to our disposition of the case, so we do not pass on it.

This ruling was correct under a "stigma-plus" section 1983 claim. However, as we have discussed at length, Phillips also put forth a valid de facto licensing section 1983 claim. The trial judge's grant of judgment for Vandygriff notwithstanding the verdict does not pay proper respect to Phillips' de facto licensing claim, so we must reverse the JNOV. Though Phillips might argue that having prevailed on the blended charge, he has earned a judgment on his claim, we cannot agree.[8]

> "[T]he test is not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues." Our jurisprudence mandates that we consider the charge as a whole, viewing it in the light of the allegations of the complaint, the evidence, and the arguments of counsel.

Smith v. Borg-Warner Corp., 626 F.2d 384, 386 (5th Cir.1980) (quoting *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1100 (5th Cir.1973), *cert denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974)). *See also Pryor v. Gulf Oil Corp.*, 704 F.2d 1364 (5th Cir.1983). Viewing the charge as a whole, and considering particularly the different theory argued by Vandygriff and accepted by the district court, it is not clear to us that the jury was clearly informed as to the nature of the de facto licensing claim. Accordingly we remand for new trial on that claim.[9]

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8. The argument is that by reaching a verdict based upon "Phillips' loss of reputation and inability to be employed in the savings and loan industry," Record at 855, the jury necessarily found facts supporting a de facto licensing claim.

9. Vandygriff raises a formalistic argument that he was not named in his individual capacity in the pleadings and that in his formal capacity he gains eleventh amendment immunity. Fed. R. Civ.P. 9(a) states:

> It is not necessary to aver the capacity of a party to sue or be sued...except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to...the capacity of any party to sue or be sued..., he sall do so by specific negative averment....

(Footnote continued on next page)

D. The Private Conspirators

Phillips pursued his section 1983 claim against the savings and loan associations as well as the state officers. His First Amended Complaint specifically mentions "[t]he actions of the Defendants in carrying out and combining to carry out established policy and practice of a state regulatory agency." Record at 178. Because all of the savings and loan associations except Paris were granted summary judgment, no issues on their section 1983 liability were presented to the jury.[10] We shall first examine the savings and loan associations that were granted summary judgment, and then consider Paris, which went to trial.

(Footnote continued from previous page)

Merely alleging eleventh amendment immunity, as Vandygriff did in his motion under Fed. R. Civ. P. 12(b)(6), is not a "specific negative averment" to raise the issue of the capacity in which Vandygriff was sued. Surely, had Vandygriff raised specifically the formalistic objection to his capacity, Phillips would have made the equally formalistic response of amending his pleadings to include the phrase "in his individual capacity."

10. First Federal Savings and Loan Association of Luling argues that it should be treated differently from the other savings and loan associations. All of the associations presented motions for summary judgment and the trial judge orally indicated he would grant all of the motions save that of Paris. See Minute Entry of September 10, 1981. Of course, to be effective the judgment must be evidenced by a written document entered in the record. Fed.R.Civ.P. 79(a). Apparently through inadvertance, no such document was entered with respect to Luling, and Luling was not formally granted judgment until the final judgment in favor of all defendants.

Luling presents the unusual argument that it was not dismissed from the case when it went to trial. Thus, Luling says, Phillips waived all jury issues with respect to its liability. We cannot accept this position. First, all parties tried the case based upon the trial judge's statement that he would grant summary judgment to Luling. We will not now allow Luling to take advantage of the ministerial oversight. Second, Rule 79(a) says nothing regarding timing of the formal entry of judgment. At the time the trial court entered final judgment for Luling, the only motion for judgment of behalf of Luling was its motion for summary judgment. Accordingly, we construe the entered-judgment as a belated formal entry of the summary judgment orally granted to Luling.

[7,8] *1. The Summary S & Ls.*—To be liable under section 1983, a defendant must have acted under color of state law. Private parties, however, can be liable under section 1983 if they have conspired with a state official. "The involvement of a state official in such a conspiracy plainly provides the state action essential" to a section 1983 claim. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142 (1970). Thus, there is no inherent legal obstacle to pursuing the savings and loan associations under section 1983.

To establish a conspiracy between the savings and loan associations and Vandygriff, "[i]t is enough that [a private party] is a willful participant in joint activity with the State or its agents." *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966), *See also Adickes, supra; Earnest v. Lowentritt*, 690 F.2d 1198, 1200 (5th Cir. 1982). Here the objectionable activity was the industry custom of de facto licensing without procedural protections. Thus, to establish his section 1983 claim against the savings and loan associations, Phillips must show that the associations were willful participants in the industry custom of de facto licensing.

In order for the distrct court's grant of summary judgment to stand, there must be no genuine issue as to any material fact and the saving and loan associations must be entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Our review of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits before the court when it passed on the motion for summary judgment convinces us that the parties did dispute material facts. There appears to be a genuine issue as to whether the savings and loan associations were willful participants in the custom. The record, with disputed issues viewed favorably toward Phillips, shows the existence of the custom, and shows that each association contacted the Department regarding Phillips and subsequently refused further consideration of him. *See, e.g.*, Record at 101 (Mainland); *id.* at 360 (Luling); *id.* at 546 (Bowie); *id.* at 572 (North Texas); *id.* at 625 (Exchange). Accordingly, we reverse the summary judgments in favor of the savings and loan associations on the section 1983 claim.

[9] *2. Paris at Trial.*—Paris is in a different situation because it actually went to trial on the section 1983 claim. The jury was charged that "Phillips also claims that Paris Savings and Loan acted under color of state law or custom to deprive him of his civil rights by agreeing with state officials Vandygriff or Wright to keep him out of the savings and loan industry." Record at 857. When asked "Do you find that Paris Savings and Loan acted under color of state law to deprive Phillips of his liberty interest?", the jury responded "No." *Id.* In the face of the jury finding that Paris did not agree to act with Vandygriff, we affirm the judgment in favor of Paris on the section 1983 claim.

E. Conclusion on Section 1983

In view of the continual confusion among the parties and the trial court as to the precise nature of Phillips' section 1983 claim, we pause a moment to wrap up what we are—and we are *not*—saying about section 1983. Vandygriff apparently told two things about Phillips to the savings and loan associations that were considering hiring Phillips. First, Vandygriff told them that Phillips had been in some undefined way connected with the "Sinton affair." Second, he told them that he would not approve Phillips for employement in the industry. These two different types of statements have very different kinds of legal consequences.

The savings and loan industry is clearly one in which the public places great trust and confidence. It is imperative that the managergial officers of savings and loan associations be of the highest character, and an association that hired a managing officer without investigating his or her character would certainly be remiss. The Commissioner of the Texas Savings and Loan Association is obviously a valuable resource for an association inquiring about a prospective employee, and, indeed, we applaud that aspect of the practice.

Had Commissioner Vandygriff limited himself merely to truthfully reporting the information he had pertinent to Phillips, this could have been a very different case. Neither section 1983 nor any other law with which we are acquainted would penalize that truthful imparting of information necessary for the public

welfare. But that most emphatically is *not* the essence of Phillips' section 1983 claim.

The practice of which Phillips complains under section 1983 is the custom giving the Commissioner de facto licensing authority over prospective managing officers of savings and loan associations. This is a difference that makes a difference. In a society based upon democracy, open public decisionmaking, and *laissez-faire*, the practice of secret, de facto licensing is as insidious a dysfunction as one can imagine. *Laissez-faire* rests on a premise of formal economic equality. Key to this economic equality is the principle that all are free to pursue all legitimate forms of economic endeavor.[11] Procedural due process embodies an equally important political principle: government intrusions on private rights must be accomplished through procedures that will promote accurate and fair decisions.

At one foul, fell swoop, the custom of de facto licensing makes a mockery of both of these lodestar principles. Through secret proceedings Phillips was denied an opportunity to practice his chosen profession. The basis of this denial apparently was nothing more than a suspicion of a possibility of impropriety. This is precisely the kind of arbitrary decisionmaking infringing an important private right that the due process clause was designed to prevent. At a minimum, the fourteenth amendment demands that such an infringement of private liberty be preceded by notice of the basis of the charges and an opportunity to respond. Because Phillips was denied these most basic protections, section 1983 provides redress.

III. ANTITRUST CLAIM

[10] Phillips also claims that this same set of facts supports an actions for a per se violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). Phillips argues that the savings and

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11. The illusory nature of formal economic equality is quite apparent in a time when there exist few jobs and even fewer people have the educational and fiscal advantages needed to pursue those few jobs.

loan associations' collective refusal to hire him without Vandygriff's approval is nothing less than a boycott in per se violation of the antitrust laws. When the trial court granted summary judgments in favor of all the associations save Paris, those judgments included judgments on the antitrust claim. Without those associations in the trial, no antitrust case remained to go to the jury.

Given this procedural background, we shall treat the entire antitrust claim as if it had been resolved on summary judgment. Accordingly, we view the facts favorably towards Phillips and assume that there was an agreement among savings and loan associations in Texas not to hire anyone as a managing officer without Vandygriff's approval. The question before us is whether that set of facts can support an antitrust claim.

A. Per Se Boycotts, Generally

In this Circuit the law concerning per se boycotts is summarized in *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109, 93 S.Ct. 912, 34 L.Ed.2d 690 (1973), and *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (1980). In *E.A. McQuade*, Judge Thornberry summarized the principles as follows:

> Cases applying *per se* illegality to collective refusals to deal fall into roughly three categories. The first group, exemplified by *Eastern States Retail Lumber Dealers Assoc. v. United States*, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1914), have involved horizontal combinations among traders at one level of distribution, whose purpose was to exclude direct competitors from the market. Thus, in *Eastern States*, a combination of retail lumber dealers black-listed lumber wholesalers who sold directly to the retailers' customers. The obvious purpose of the combination—eliminating competiton from the wholesalers—placed it "within the prohibited class of undue and unreasonble restraints." 234 U.S. at 612, 34 S.Ct. at 954.

Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), illustrates a second category of group boycott cases, involving vertical combinations among traders at different marketing levels, designed to exclude from the market direct competitors of some members of the combination. For example, in *Klor's*, a large appliance dealer, Broadway-Hale, used its purchasing power to induce defendant manufacturers and wholesalers to sell only at discriminatory prices to plaintiff, a competing appliance dealer. Since the effect of the agreement was to drive Klor's out of competition with Broadway, the Court found the three-cornered agreement illegal *per se*, notwithstanding the fact that the manufacturers and wholesalers, not in competition with Klor's probably had no such anti-competitive motive.

Unlike these first categories, the thrid group of cases has concerned combinations designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors. The leading case in the area is *Fashion Originators Guild of America v. Federal Trade Comm'n*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941), in which a group of "original" designers refused to sell their creations to retailers who purchased and sold copies of the original designs. In holding this refusal to deal illegal *per se*, the Court declared that even though the object of the boycott was to prevent the retailers from dealing with manufacturers of the copies and thereby eliminate "style piracy," the coercion practiced indirectly on a rival method of competition precluded application of the rule of reason.

In all of the cases, the touchstone of *per se* illegality has been the purpose and effect of the arrangement in question. Where exclusionary or coercive conduct has been present, the arrangements have been viewed as "naked restraints of trade," and have fallen victim to the *per se* rule. On the other hand, where these elements have been missing, the *per se* rule has not been applied to collective refusals to deal. *See, e.g.*,

> *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 9th Cir.1969, 416 F.2d 71, cert. denied, 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970), holding that a concerted refusal by two manufacturers to renew plaintiff's exclusive sales rights was not *per se* illegal because the refusal was motivated solely by the manufacturers' concern for the integrity of their distribution systems. We conclude that resort to the *per se* rule is justified only when the presence of exclusionary or coercive conduct warrants the view that the arrangement in question is a "naked restraint of trade." Absent these factors, the rule of reason must be followed in determining the legality of the arrangement.

E.A. McQuade, supra, 467 F.2d at 186-87 (citations omitted). In *Realty Multi-List* we added the following observations:

> The presence of purposefully exclusionary or coercive conduct is a strong indication that the boycott is a naked restraint of trade; indeed, if no other purposes are present, this purpose will warrant outright condemnation of the practice. In light of our discussion of the *per se* rule, however, and particularly in light of the BMI case, it is also necessary to inquire further to determine whether the practice is at least potentially reasonably ancillary to joint, efficiency-creating economic activities. In *BMI, supra*, the Court held that the *per se* rule was inapplicable to the form of price-fixing practiced by defendants in its blanket licensing system in part because it "accompanie[d] the integration of sales, monitoring, and enforcement against unauthorized copyright use." 99 S.Ct. at 1562. The generalization supporting *per se* treatment lost its force in that situation, and, even though defendants purposefully "fixed a price," it became necessary to assess under the rule of reason the net competitive impact of the practice when compared to the pro-competitive effects of the integration. *Id.* at 1565. Similarly, with group boycotts, we must be cautious to determine whether conduct whose apparent purposes, standing along, might warrant *per se* treatment

> are reasonably connected to an integration of productive activities or other efficiency-creating activity in such a manner as to require an inquiry into the net competitive effect under the rule of reason. *See* L. Sullivan, Antitrust § 89 (1977).

Realty Multi-List, supra, 629 F.2d at 1367.

B. Per Se Boycott and De Facto Licensing

We must now decide whether the practice in this case of de facto licensing constitutes a per se violation of the Sherman Act. The defendants contend that the three types of per se boycotts of *E.A. McQuade* constitute a complete canonical list of all possible per se boycotts. We cannot read *E.A. McQuade* so narrowly. The closing sentence of the quoted passage states that "resort to the *per se* is justified only when the presence of exclusionary or coercive conduct warrants the view that the arrangements in question is a 'naked restraint of trade.' " *E.A. McQuade, supra*, 467 F.2d at 187. This suggests that another sort of boycott, other than the three types enumerated, can be a per se violation if it is a similar sort of naked restraint of trade. In determining whether *this* practice is a similar naked restraint of trade we are guided by *Realty Multi-List*.

This case presents employers of managing officers of savings and loan associations agreeing not to hire managing officers without Vandygriff's approval. This "purposefully exclusionary" conduct "is a strong indication that the boycott is a naked restraint of trade." *Realty Multi-List, supra*, 629 F.2d at 1367. "[H]owever, ...it is also necessary to inquire further to determine whether the practice is at least potentially reasonably ancillary to joint, efficiency-creating economic activities." *Id.*

The practice here of consulting with Vandygriff has substantial joint efficiency-creating economic potential. As mentioned before, the savings and loan industry is a repository of public trust and confidence. It is vital to the industry that the managing officers of the associations be of highest character and ability. It would be difficult, if not impossible, for every savings and loan association to assume the responsibility of thoroughly investigating the background of each and every potential

managing officer. The Commissioner of the Texas Savings and Loan Department is in a unique position to serve as a clearing house for information on people working in the industry. Consulting with him with regard to prospective employees is an eminently reasonable technique for reducing the information-collecting costs of the individual savings and loan associations.

Of course, this relates only to the use of Vandygriff as an information resource. The custom of which Phillips complains is that of giving Vandygriff de facto licensing power. Still, we believe that the de facto licensing power is "at least potentially reasonably ancillary" to the practice of using Vandygriff as an information resource. Thus, we conclude that the practice of screening prospective managerial employees with the Commissioner is "at least potentially reasonably ancillary to joint, efficieny-creating economic activities." *Id.* Accordingly, in spite of the purposefully exclusionary conduct inherent in the practice, we conclude that it is not a per se violation of the Sherman Act. Because Phillips does not alternatively argue before us that the conduct is violative of the rule of reason, we affirm the trial judge's summary judgment in favor of the savings and loan associations on this claim and affirm the refusal to submit jury issues on this claim with respect to the then remaining defendants.

IV. INTERFERENCE

[11] Phillips also presses a pendent state claim for interference. The essence of his claim is that, absent Vandygriff's acts, he would have entered into a contractual relationship with one or more of the savings and loan associations. Because the associations had all agreed to follow the custom of de facto licensing, Phillips argues, they were all guilty of the same tort through civil conspiracy principles. We shall first recap the procedures below, then discuss Vandygriff, and finally, the savings and loan associations.

A. Procedures Below

The savings and loan associations, except for Paris, were all granted summary judgment on the tortious interference claim. At trial the trial judge submitted issues as to whether

defendants Wright, Vandygriff, and the Department had interfered with Phillips' prospective contractual relations with prospective purchasers of Paris. The jury found no interference. Record at 863. Phillips had objected to this charge because it related solely to his prospective relations with the buyers of Paris,[12] and did not include his prospective employment with the other savings and loan associations. Transcript at 918-19.

B. Vandygriff

[12] Texas provides a cause of action for tortious interference with prospective contractual relations.

> For a plaintiff... to prevail, he must show that (1) there was a "reasonable probability" that he would have entered into a contractual relationship; (2) defendant acted maliciously by intentionally preventing the relationship from occurring with the purpose of harming plaintiff; (3) the defendant was not privileged or justified, and (4) actual harm or damage occured as a result.

Leonard Duckworth, Inc. v. Michael L. Field & Co., 516 F.2d 952, 956 (5th Cir.1975) (Texas law). *See also Verkin v. Melroy*, 699 F.2d 729 (5th Cir.1983)(same).

The record discloses sufficient probative evidence that we believe reasonable jurors might have found that Vandygriff interfered with prospective contractual relations between Phillips and the other savings and loan associations. Without developed jury findings and briefing we will not speculate on all possible states of affairs that would support such a cause of action. Rather, we hold that it was error to remove the question of interference with respect to savings and loan associations other than Paris from the jury. Accordingly, we reverse and remand for further proceedings on this claim against Vandygriff.

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12. Phillips was trying to arrange the sale of Paris to a group of buyers that would employ him.

C. The Savings and Loan Associations

This is another example of the defendants not adequately responding to Phillips' claims against them because they misconceived the nature of his claim. Phillips claims that the industry custom allowing Vandygriff to have de facto licensing power over managerial employees resulted in Vandygriff's tortiously interfering with prospective contractual relationships between Phillips and each of the savings and loan associations. Phillips further claims that each savings and loan association, by participating in the custom, became vicariously liable for Vandygriff's acts pursuant to that custom under theories of civil conspirary. Phillips has some support for his position. *See e.g., Schlumberger Well Surveying Corp. v. Nortex Oil and Gas Corp.*, 435 S.W.2d 854 (Tex.1968); *International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567 (Tex.1963); *Bourland v. Texas*, 528 S.W.2d 350 (Tex.Civ.App.1975, writ ref. n.r.e.).

Having reviewed the record before the trial court at the time he relied on the motions for summary judgment, we cannot say that there were no disputed issues of material fact regarding this claim. Fed.R.Civ.P. 56(c). Again, we will not attempt to enumerate all the possible circumstances that might be proven to establish the conspiracy claim, but instead merely reverse the summary judgments in favor of the savings and loan associations on the interference claim and remand for further proceedings.

Paris, however, is in a different situation—Paris participated in the trial. No jury issues were submitted with regard to Paris' vicarious liability, and Phillips did not object to this omission. Thus, we affirm the judgment in favor of Paris. Fed. R.Civ.P. 51.

CONCLUSION

The essence of this case is that the Commissioner of the Texas Savings and Loan Department and various individual savings and loan associations agreed to a custom of de facto licensing of managing officers. This custom has several vices. Most severe among these is the risk that the state officer may foreclose a person from practicing a lawful occupation without affording that person any procedural protections. Second, the

practice might, under some circumstances, result it interference with a prospective contractual relationship that would have been consummated but for the custom. Finally, the apparently uniform participation in the custom by savings and loan associations raises the possibility of vicarious liability.

These problems with the custom, however, are procedural rather than substantive. We certainly do not condemn the basic motivation for the custom: ensuring that managing officers of savings and loans are of the highest character and competence. The virtue of these good intentions is sufficient to save the practice from the fiery pit reserved for per se antitrust violations.

In light of the procedural complexity of this case, with its multiple claims, multiple defendants, and multiple dispositions, we reiterate our disposition of the case. The judgment in favor of defendant Paris is affirmed as to all claims. The judgment in favor of all defendants as to the antitrust claim is affirmed. The judgment in favor of Vandygriff on the civil rights claim is reversed and remanded for further proceedings. The judgment in favor of Vandygriff on the interference claim with respect to Paris is affirmed. The judgment in favor of Vandygriff on the intereference claim with respect to the other associations is reversed and remanded for further proceedings. The judgments in favor of the associations other than Paris regarding civil conspiracy, on the civil rights claim and the remaining interference claims, are reversed and remanded for further proceedings.[13]

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

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13. We provide a schematic representation of the claims on appeal, and our disposition of them. Phillips did not appeal as to: (1) Texas Savings and Loan Department; (2) Deputy Commissioner Wright; (3) Aztec Savings and Loan; (4) defamation; (5) interference with prospective contractual relations with Paris. The appealed claims, the trial court's disposition, and our disposition on appeal are as follows:

	Section 1983	antitrust	interference with other S&Ls
Vandygriff	JNOV — rev'd	DV —aff'd	DV — rev'd
Paris S&L	JV — aff'd	DV — aff'd	DV — aff'd
Other S&Ls	SJ — rev'd	SJ — aff'd	SJ — rev'd

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EDWARD N. PHILLIPS	§	
	§	
v.	§	NO. A-80-CA-014
	§	
ALVIS VANDYGRIFF, et al.	§	

MEMORANDUM OPINION AND ORDER

Came on to be heard this date the parties' Motions for Judgment, and the Court, finding Plaintiff's Motion to be without merit (except in that it concedes no right to recover from the DEPARTMENT OF SAVINGS & LOANS) and Defendant VANDYGRIFF's Motion to have merit, hereby ORDERS that a take-nothing judgment be entered against Defendant VANDYGRIFF for the following reasons:

Codd v. Velger, 429 U.S. 624 (1977), recently held that falsity is an element of the cause of action under 42 U.S.C. §1983 (and that the burden is on Plaintiff to prove falsity) where stigma, lost of reputation, and deprivation of the constitutionally protected liberty interest has been alleged.

In the series of interrogatories requested and submitted on the issue of defamation, the jury found that the information communicated by Defendant VANDYGRIFF to others in the industry, which was alleged to be defamatory, was true. While the interrogatory was submitted with reference to a specific time frame, the finding that the information was true is controlling of the §1983 cause of action where the substance of the defamatory communication was the same both before and after the date given in the defamation interrogatory. Therefore, the finding of truth in Interrogatory No. 21 is binding on Plaintiff and his claim for damages under §1983.

The Defendant came so lately to the conclusion that falsity was an element of the Plaintiff's cause of action under §1983

that he did not request that the jury be so instructed. On the other hand, it is clear to the Court from the jury's answer to Interrogatory No. 21 that the jury would not have found a cause of action under §1983 had they known that they could not award damages under §1983 if they found the stigmatizing or defamatory communication to be true.*

Therefore, as a matter of law, Plaintiff cannot recover damages or attorney's fees on the verdict returned by the jury.

Although Plaintiff did not prevail on a single issue presented in this lawsuit, the Court here appends its findings as to what Plaintiff's reasonable attorney's fee award would have been had Plaintiff prevailed. After considering the guidelines for assessing attorney's fees in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), the Court finds $25,000 to be a reasonable fee for the work done by Jack Price, Esq., on the case. This amount is considerably less than the amount computed by Mr. Price, but the Court notes that Mr. Price did not arrive at his fee from the time records made contemporaneous with the time spent [see *Heilger v. Gatter*, 463 F.Supp. 802 (E.D.Pa. 1978)] nor did he prevail on even the majority of the claims presented to the jury. The Court further notes that the expertise he claims in anti-trust matters proved to be of no value to his client where the nature of the anti-trust issues was such that they were dismissed summarily and where only a §1983 claim was presented to the Court.

These being the findings and rulings of the Court, a take-nothing judgment is ORDERED to be entered against Defendant on this 4th day of November, 1981.

LUCIUS D. BUNTON
United States District Judge

*Because the Court finds this argument dispositive of the §1983 issue, it is unnecessary to further consider whether under the pleadings Plaintiff actually sued Defendant VANDYGRIFF in his individual capacity.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EDWARD N. PHILLIPS	§	
	§	
v.	§	NO. A-80-CA-014
	§	
ALVIS VANDYGRIFF, et al.	§	

JUDGMENT

It is hereby ORDERED, ADJUDGED and DECREED that Plaintiff take nothing against Defendants and costs are assessed against the Plaintiff.

SIGNED and ENTERED this 4th day of November, 1981.

LUCIUS D. BUNTON
United States District Judge

APPENDIX G

FIRST AMENDMENT TO THE CONSTITUTION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

Art. 6252-13a. Administrative Procedure and Texas Register Act

Purpose

Section 1. It is declared the public policy of this state to afford minimum standards of uniform practice and procedure for state agencies, to provide for the public participation in the rulemaking process, to provide adequate and proper public notice of proposed agency rules and agency actions through publication of a state register, and to restate the law of judicial review of agency action.

Short title

Sec. 2. This Act shall be known and may be cited as the Administrative Procedure and Texas Register Act.

Definitions

Sec. 3. As used in this Act:

(1) "Agency" means any state board, commission, department, or officer having statewide jurisdiction other than an agency

wholly financed by federal funds, the legislature, the courts, the Industrial Accident Board, and institutions of higher education, that makes rules or determines contested cases.

(2) "Contested case" means a proceeding, including but not restricted to ratemaking and licensing, in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for adjudicative hearing.

(3) "License" includes the whole or part of any agency permit, certificate, approval, registration, or similar form of permission required by law.

(4) "Licensing" includes the agency process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license. ....

Contested cases; notice, hearings; records

Sec. 13. (a) In a contested case, all parties must be afforded an opportunity for hearing after reasonable notice of not less than 10 days.

(b) The notice must include:

(1) a statement of time, place, and nature of the hearing.

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved; and

(4) a short and plain statement of the matters asserted.

(c) If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, on timely written application, a more definite and detailed statement must be furnished not less than three days prior to the date set for the hearing.

(d) Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved.

(e) Unless precluded by law, informal disposition may be made of any contested case

by stipulation, agreed settlement, consent order, or default.

(f) The record in a contested case includes:

(1) all pleadings, motions, and intermediate rulings;

(2) evidence received or considered;

(3) a statement of matters officially noticed;

(4) questions and offers of proof, objections, and rulings of them;

(5) proposed findings and exceptions;

(6) any decision, opinion, or report by the officer presiding at the hearing; and

(7) all staff memoranda or data submitted to or considered by the hearing officer or members of the agency who are involved in making the decision.

(g) Proceedings, or any part of them, must be transcribed on written request of any party. The agency may pay the cost of the transcript or assess the cost to one or more parties. This Act does not limit an agency to a stenographic record of proceedings.

(h) Findings of fact must be based exclusively on the evidence and on matters officially noticed. ....

Rules of evidence, official notice

Sec. 14. (a) In contested cases, irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in nonjury civil cases in the district courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, if a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part

of the evidence may be received in written form. ....

Discovery, entry on property; use of reports and statements

Sec. 14a. (a) Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to such limitations of the kind provided in Rule 186b of the Rules of Civil Procedure as the agency may impose, the agency in which an action is pending may order any party:

(1) to produce and permit the inspection and copying or photographing by or on behalf of the moving party any of the following which are in his possession, custody, or control; any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain, or are reasonably calculated to lead to the discovery of, evidence material to any matter involved in the action; ....

Decisions and orders

Sec. 16. (a) A final decision or order adverse to a party in a contested case must be in writing or stated in the record.

(b) A final decision must include findings of fact and conclusions of law, separately stated. ....

Licenses

Sec. 18. (a) When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this Act concerning contested cases apply. ....

Judicial review of contested cases

Sec. 19. (a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this Act. This section is cumulative of other means of redress provided by statute.

(b) Proceedings for review are instituted by filing a petition within 30 days after the

decision complained of is final and appealable. ....